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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: **BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION** **(MDL NO. 2406)**	**Master File No. 2:13-CV-20000-RDP** **This document relates to:** **2:12-cv-02532** **2:15-cv-01345** **2:15-cv-01346** **2:15-cv-01347** **2:15-cv-01348** **2:15-cv-01349** **2:15-cv-01475** **2:15-cv-01550** **2:15-cv-02295** **OPPOSED**

VERIFIED MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF SEEEKING A PRELIMINARY INJUNCTION

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Certain University of Pittsburgh Medical Center ("UPMC") hospitals, UPMC East, UPMC Hamot, UPMC Magee-Womens Hospital, UPMC McKeesport, UPMC Mercy, UPMC Passavant, UPMC Presbyterian Shadyside, and UPMC St. Margaret (hereinafter, collectively the "UPMC Hospitals") hereby move to intervene in the above actions for the limited purpose of seeking a preliminary injunction against all Defendants other than Highmark Health Services ("Defendants"). As set forth in UPMC's Motion for Preliminary Injunction and the accompanying materials, filed contemporaneously, the UPMC Hospitals are entitled to injunctive relief. As set forth herein, the UPMC Hospitals are entitled to intervene in these actions for the limited purpose of seeking such relief.

I. THE UPMC HOSPITALS SATISFY THE LEGAL REQUIREMENTS FOR INTERVENTION

"Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993); *see also Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) (explaining that the two important purposes of Rule 24 are "to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation"). Intervention is especially compelling is this situation where the UPMC Hospitals seek preliminary injunctive

relief with regard to precisely the same of course of illegal conduct being litigated before this Court.

The Court recently set forth the legal requirements for permissive intervention pursuant to Rule 24(b):

> Federal Rule of Civil Procedure 24(b) permits a party to intervene if, by timely motion, the party asserts "a claim or defense that shares with the main action a common question of law or fact." The principal consideration is whether intervention will "unduly prejudice or delay the adjudication of the rights of the original parties." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002); *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). Ultimately, the decision to allow a party to permissively intervene is "wholly discretionary with the court." *Worlds v. Dep't of Health and Rehabilitative Servs.*, 929 F.2d 591, 595 (11th Cir. 1991).

Alabama v. Dept. of Commerce, 2:18-CV-772-RDP, 2018 WL 6570879, at *2 (N.D. Ala. Dec. 13, 2018).

> A party seeking to intervene as of right under Rule 24(a)(2) must show that: (1) his application to intervene is timely; (2) he has an interest related to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). UPMC satisfies the requirements for permissive intervention and for intervention as of right; therefore, the motion to intervene should be granted.

A. THE UPMC HOSPITALS' MOTION TO INTERVENE IS TIMELY

"The question of timeliness lies within the district court's discretion." *United States v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977). *See also United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983) ("The question of timeliness is largely committed to the district court's discretion.") "[T]imeliness is not limited to chronological considerations, it 'is to be determined from all the circumstances.'" *U.S. v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977) (quoting *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973)).

In considering timeliness, the Court considers four factors: "(1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely." *United States v. Jefferson County*, 720 F.2d at 1516.

With regard to the first factor, the question is not when the UPMC Hospitals first became aware that they were putative class members in the litigation because

their interests in the litigation are generally represented by the Named Plaintiffs. The operative question is when the UPMC Hospitals became aware that intervention in this action was necessary to protect their legal interests through a preliminary injunction. These UPMC Hospitals have been injured by the Blues' antitrust violations in the same manner as the Named Plaintiffs and other putative class members. Unlike other putative class members, however, the UPMC Hospitals will face acute reputational damage, and potential civil fines stemming from a new lawsuit filed by the Pennsylvania Attorney General predicated, in part, on UPMC's inability to secure in-network contracts with the non-Highmark Blues. .[1] However, as set forth in detail in the UPMC Hospitals' Motion for Preliminary Injunction this will not occur until June 30, 2019, several months from now.

The UPMC Hospitals have not delayed in seeking intervention. As set forth in paragraphs 21-31 of the Motion for Preliminary Injunction, UPMC has unsuccessfully attempted to resolve this issue without seeking the Court's intervention. After the Court's determination that the Blues' market allocation scheme was subject to the *per se* standard, UPMC reached out to the Defendants in an effort to resolve this matter but were rebuffed. UPMC awaited the Eleventh Circuit's decision regarding the Blues' petition for permission to appeal because

[1]UPMC Presbyterian Shadyside will be in-network for Blues subscribers when providing four unique transplants or cystic fibrosis services. UPMC Hamot is in-network with BCBS-WNY members only.

denial of the petition further assured the likelihood of UPMC succeeding on the merits with regard to its motion for preliminary injunction.

The need for immediate relief became even more acute on February 7, 2019, when the Pennsylvania Attorney General filed a Petition to Modify the Consent Decree governing the relationship between UPMC and Highmark.[2] That petition is pending in the Commonwealth Court of Pennsylvania, Case No. 334 M.D. 2014. The petition seeks to impose draconian penalties on UPMC for, among other things, failing to provide in-network services to members of non-Highmark Blues once the Consent Decree expires. Because the UPMC Hospitals are willing to contract with the Defendant Blue Plans at their current rates, this situation is the fault of Defendants, who have agreed not to contract with the UPMC Hospitals. Accordingly, the UPMC Hospitals' motion to intervene is timely.

With regard to the second factor, "[t]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). The UPMC Hospitals did not delay in seeking intervention. Moreover, the parties to this action cannot possibly have suffered prejudice from the requested intervention

[2] Details regarding the consent decree are set forth in paragraphs 14 through 17 of the Motion for Preliminary Injunction.

solely for the purpose of seeking a preliminary injunction. Because the UPMC Hospitals do not "seek to delay or reconsider phases of the litigation that ha[ve] already concluded," their motion is timely. *Wal–Mart Stores, Inc. v. Texas Alcoholic Bev. Commn.*, 834 F.3d 562, 565–66 (5th Cir. 2016).

The UPMC Hospitals will unquestionably suffer extreme prejudice if their motion to intervene is denied. The Eleventh Circuit has indicated that prejudice is apparent "if the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party that the party's representation may be inadequate to protect the movant's interest." *United States v. Jefferson County*, 720 F.2d at 1516. The UPMC Hospitals do not have a greater interest than the named Plaintiffs or the other putative class members, but their interest and need for injunctive relief is more acute than the parties to the current litigation can achieve absent intervention by the UPMC Hospitals. Accordingly, the UPMC Hospitals should be permitted to intervene.

B. THE UPMC HOSPITALS SATISFY THE OTHER REQUIREMENTS FOR PERMISSIVE INTERVENTION

1. The UPMC Hospitals Assert a Claim That Shares Common Questions of Law and Fact with the Main Actions.

Because the UPMC Hospitals' claim for injunctive relief mirrors the common questions of law and fact in the actions before this Court, the UPMC Hospitals adopt the Provider Plaintiffs' complaints in those underlying actions. The

adoption of these complaints meets the requirements of Rule 24 because the filing of an additional pleading "which merely replicated these documents, would have been surplusage." *Piambino v. Bailey*, 757 F.2d 1112, 1121 (11th Cir. 1985). *See also Tosto v. Zelaya*, 06-21213-CIV, 2012 WL 12850139, at *4 (S.D. Fla. Aug. 16, 2012), *aff'd sub nom. Zelaya/Capital Intern. Judm., LLC v. Zelaya*, 769 F.3d 1296 (11th Cir. 2014) ("The Eleventh Circuit has clarified, however, that a separate pleading is not required where the motion to intervene and accompanying papers clearly spell out the movant's claim for injunctive relief.")

As set forth in more detail in the UPMC Hospitals' Verified Motion for Preliminary Injunction and the documents supporting that motion, the UPMC Hospitals are being irreparably harmed because Defendants are denying the UPMC Hospitals the ability to compete with other providers for the ability to treat non-Highmark patients on an in-network basis. Accordingly, the UPMC Hospitals are being harmed as a direct result of the market allocation agreement this Court has found to be subject to the *per se* standard of review. The UPMC Hospitals' claim for injunctive relief unquestionably shares common questions of law and fact with the main actions.

2. Permitting Intervention to Seek Injunctive Relief Will Not Result in Prejudice or Delay

The UPMC Hospitals are members of the putative provider class and assert the same claims as the Provider Plaintiffs in the underlying actions. Accordingly,

neither Plaintiffs nor Defendants will be prejudiced by the UPMC Hospitals' intervention for the purpose of seeking injunctive relief. Moreover, permitting the UPMC Hospitals to intervene for the limited purpose of requesting a preliminary injunction will not delay this litigation. In fact, Defendants themselves have consistently sought scheduling orders that would result in longer times to resolution of the case than the Plaintiffs have proposed. Defendants should not be permitted to oppose intervention on the basis of prejudice or delay where their continuing illegal conduct has created the urgent need for the UPMC hospitals to seek more expedited relief in order to avoid irreparable harm.

C. THE UPMC HOSPITALS ALSO SATSIFY THE REMAINING REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

1. The UPMC Hospitals Have an Interest in the Property or Transaction That Is The Subject of the Litigation and That Interest Will Be Impaired If Intervention Is Not Permitted

"Under Rule 24(a)(2), the…intervention must be supported by a '"'direct, substantial, legally protectible interest in the proceeding.'"'' *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (quoting *Athens Lumber Co., Inc. v. Federal Election Commission*, 690 F.2d 1364, 1366 (11th Cir. 1982)). "'In essence, the [intervenors] must be at least…real part[ies] in interest in the transaction which is the subject of the proceeding.'" *Chiles*, 865 F.2d at 1213-1214 (quoting *Athens Lumber Co.*, 690 F.2d at 1366. The intervenor's "interest need not, however 'be of a legal nature identical to that of the claims asserted in the main action.'" *Id.*, at

1214 (quoting *Diaz Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970)). "This inquiry is flexible concentrating on the facts and circumstances underlying the motion. *Id.*

The UPMC Hospitals' claims mirror the claims asserted in this litigation and the UPMC Hospitals seek to enjoin the same course of illegal conduct this Court has already found must be considered under the *per se* standard of review. Clearly, the UPMC Hospitals have an interest in this litigation. Moreover, if the UPMC Hospitals are not permitted to intervene in order to seek a preliminary injunction, the UPMC Hospitals' interest will be impaired even if permanent injunctive relief is eventually awarded in this action.

2. The UPMC Hospitals' Interests Are Not Represented By the Current Parties with Regard to Preliminary Injunctive Relief.

"The proposed intervenors' burden to show that their interest *may be* inadequately represented is minimal." *Federal Savings and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993). "The Supreme Court has held that the inadequate representation requirement 'is satisfied if the [proposed intervenor] shows that representation of his interest "may be" inadequate' and that 'the burden of making that showing should be treated as minimal.'" *Chiles*, 865 F.2d at 1214 (quoting *Trbovich v. United Mine Workers of* America, 404 U.S. 528, 538 n. 10 (1972)).

Defendants, whose interests are adverse to the UPMC Hospitals, clearly do not represent their interests in seeking injunctive relief to preliminarily enjoin Defendants' illegal conduct with regard to the UPMC Hospitals. While the Named Plaintiffs generally represent the UPMC Hospitals' interest in this litigation, in the absence of a certified class, there are serious questions about the Named Plaintiffs' standing to seek a preliminary injunction on the UPMC Hospitals' behalf. Accordingly, the UPMC Hospitals' interests are not represented in this litigation with regard to the relief the UPMC Hospitals immediately seek.

II. CONCLUSION

For the foregoing reasons, the UPMC Hospitals respectfully ask the Court to enter an order granting them intervenor status in this action for the limited purpose of seeking a preliminary injunction against Defendants' illegal conduct that currently threatens the UPMC Hospitals with irreparable harm.

Date: February 21, 2019

Respectfully submitted,

/s/ Edith M. Kallas
Edith M. Kallas – ***Co-Lead Counsel***
WHATLEY KALLAS, LLP
1180 Avenue of the Americas, 20th Floor
New York, NY 10036
Tel: (212) 447-7060
Fax: (800) 922-4851
Email: ekallas@whatleykallas.com

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr. – ***Co-Lead Counsel***
W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com

Patrick J. Sheehan
WHATLEY KALLAS, LLP
60 State Street, 7th Floor
Boston, MA 02109
Tel: (617) 573-5118
Fax: (617) 371-2950
Email: psheehan@whatleykallas.com

Deborah J. Winegard
WHATLEY KALLAS, LLP
1068 Virginia Avenue, NE
Atlanta, GA 30306
Tel: (404) 607-8222
Fax: (404) 607-8451
Email: dwinegard@whatleykallas.com

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

E. Kirk Wood, Jr. – ***Local Facilitating Counsel***
WOOD LAW FIRM LLC
P. O. Box 382434
Birmingham, AL 35238
Tel: (205) 612-0243
Fax: (205) 705-1223
Email: ekirkwood1@bellsouth.net

Charles Clinton Hunter
HAYES HUNTER PC
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (281) 768-4731
Fax: (713) 583-7047
Email: chunter@hayeshunterlaw.com

Aaron S. Podhurst – ***Plaintiffs' Steering Committee***
Peter Prieto – ***Chair, Expert Committee***
PODHURST ORSECK, P.A.
One S.E. 3rd Avenue
Suite 2300
Miami, FL 33131
Tel: (305) 358-2800
Fax: (305) 358-2382
Email: apodhurst@podhurst.com
pprieto@podhurst.com

Dennis Pantazis – ***Plaintiffs' Steering Committee***
Brian Clark – ***Discovery Committee***
WIGGINS CHILDS PANTAZIS FISHER GOLDFARB
The Kress Building
301 Nineteenth Street North
Birmingham, AL 35203
Tel: (205) 314-0500
Fax: (205) 254-1500
Email: dgp@wcqp.com
bclark@wcqp.com

U.W. Clemon – ***Plaintiffs' Steering Committee***
U. W. Clemon, LLC
5202 Mountain Ridge Parkway
Birmingham, AL 35222
Tel: (205) 837-2898
Email: clemonu@bellsouth.net

Dennis C. Reich – ***Chair, Damages Committee***
REICH & BINSTOCK, LLP
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (713) 622-7271
Fax: (713) 623-8724
Email: dreich@rbfirm.net

J. Mark White – ***Litigation Committee***
Augusta S. Dowd – ***Chair, Litigation Committee***
Linda G. Flippo – ***Discovery Committee***
WHITE ARNOLD & DOWD, P.C.
The Massey Building
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Tel: (205) 323-1888
Fax: (205) 323-8907
Email: mwhite@whitearnolddowd.com
adowd@whitearnolddowd.com
lflippo@whitearnolddowd.com

Nicholas B. Roth – ***Chair, Discovery Committee***
Julia Smeds Roth – ***Discovery Committee***
EYSTER KEY TUBB ROTH MIDDLETON & ADAMS, LLP
402 East Moulton Street, SE
Decatur, AL 35602
Tel: (256) 353-6761
Fax: (256) 353-6767
Email: nbroth@eysterkey.com
jroth@eysterkey.com

Van Bunch – ***Chair, Class Certification Committee***
BONNETT FAIRBOURN FRIEDMAN & BALINT, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Tel: (602) 274-1100
Fax: (602) 274-1199
Email: vbunch@bffb.com

David A. Balto – ***Expert Committee***
THE LAW OFFICES OF DAVID A. BALTO
1350 I Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 789-5424
Fax: (202) 589-1819
Email: david.balto@dcantitrustlaw.com

Robert J. Axelrod – ***Chair, Written Submissions Committee***
AXELROD & DEAN LLP
830 Third Avenue, 5th Floor
New York, NY 10022
Tel: (646) 448-5263
Fax: (212) 840-8560
Email: rjaxelrod@axelroddean.com

Joey K. James – ***Litigation Committee***
BUNCH & JAMES
P. O. Box 878
Florence, AL 35631
Tel: (256) 764-0095
Fax: (256) 767-5705
Email: joey@bunchandjames.com

W. Daniel Miles, III – ***Written Submissions Committee***
BEASLEY ALLEN CROW METHVIN PORTIS
& MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Tel: (800) 898-2034
Fax: (334) 954-7555
Email: dee.miles@beasleyallen.com

Richard S. Frankowski – ***Discovery Committee***
THE FRANKOWSKI FIRM, LLC
231 22nd Street South, Suite 203
Birmingham, AL 35233
Tel: (205) 390-0399
Fax: (205) 390-1001
Email: richard@frankowskifirm.com

Michael C. Dodge – ***Expert Committee***
GLAST PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Tel: (972) 419-7172
Email: mdodge@gpm-law.com

John C. Davis – ***Written Submissions Committee***
LAW OFFICE OF JOHN C. DAVIS
623 Beard Street
Tallahassee, FL 32303
Tel: (850) 222-4770
Email: john@johndavislaw.net

Michael E. Gurley, Jr. – ***Discovery Committee***
Attorney at Law
24108 Portobello Road
Birmingham, AL 35242
Tel: (205) 908-6512
Email: mgurleyjr@yahoo.com

Mark K. Gray – ***Discovery Committee***

Lynn W. Jinks, III – ***Expert Committee***

GRAY & WHITE
713 E. Market Street, Suite 200
Louisville, KY 40202
Tel: (502) 805-1800
Fax: (502) 618-4059
Email: mgray@grayandwhitelaw.com

Christina D. Crow – ***Discovery Committee***
JINKS CROW & DICKSON, P.C.
219 North Prairie Street
Union Springs, AL 36089
Tel: (334) 738-4225
Fax: (334) 738-4229
Email: ljinks@jinkslaw.com
ccrow@jinkslaw.com

Stephen M. Hansen – ***Class Certification Committee***
LAW OFFICE OF STEPHEN M. HANSEN
1821 Dock Street
Tacoma, WA 98402
Tel: (253) 302-5955
Fax: (253) 301-1147
Email: steve@stephenmhansenlaw.com

Myron C. Penn – ***Discovery Committee***
PENN & SEABORN, LLC
53 Highway 110
Post Office Box 5335
Union Springs, AL 36089
Tel: (334) 738-4486
Fax: (334) 738-4432
Email: myronpenn28@hotmail.com

Harley S. Tropin – ***Damages Committee***
Javier A. Lopez – ***Discovery Committee***
KOZYAK TROPIN & THROCKMORTON, P.A.
2525 Ponce De Leon Boulevard, 9th Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: hst@kttlaw.com
jal@kttlaw.com

J. Preston Strom, Jr. – ***Litigation Committee***
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard, Suite A
Columbia, SC 29204-3905
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com

C. Wes Pittman – ***Settlement Committee***
THE PITTMAN FIRM, P.A.
432 McKenzie Avenue
Panama City, FL 32401
Tel: (850) 784-9000
Fax: (850) 763-6787
Email: wes@pittmanfirm.com

Thomas V. Bender – ***Discovery Committee***
Dirk L. Hubbard
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Tel: (816) 421-0700
Email: tbender@hab-law.com
dhubbard@hab-law.com

Robert B. Roden – ***Litigation Committee***
SHELBY RODEN, LLC
2956 Rhodes Circle
Birmingham, AL 35205
Tel: (205) 933-8383
Fax: (205) 933-8386
Email: rroden@shelbyroden.com

Gregory S. Cusimano – ***Litigation Committee***
CUSIMANO, ROBERTS & MILLS, LLC
153 South 9th Street
Gadsden, AL 35901
Phone: (256) 543-0400
Fax: (256) 543-0488
Email: greg@alalawyers.net

Gary E. Mason – ***Class Certification Committee***
WHITFIELD BRYSON & MASON, LLP
1625 Massachusetts Ave. NW, Suite 605
Washington, DC 20036
Tel: (202) 429-2290
Fax: (202) 640-1160
Email: gmason@wbmllp.com

Brian E. Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 N. Miles Street
Appleton, MN 56208
Tel: (320) 289-2363
Fax: (320) 289-2369
Email: brian@wojtalewiczlawfirm.com

Michael L. Murphy – ***Discovery Committee***
BAILEY GLASSER LLP
910 17th Street, NW, Suite 800
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: mmurphy@baileyglasser.com

Archie C. Lamb, Jr.
ARCHIE LAMB & ASSOCIATES, LLC
301 19th Street North, Suite 585
The Kress Bldg.
Birmingham, AL 35203-3145
(205) 458-1210
Email: alamb@archielamb.com

Lance Michael Sears
SEARS & SWANSON, P.C.
First Bank Building
2 North Cascade Avenue, Suite 1250
Colorado Springs, CO 80903
Tel: (719) 471-1984
Fax: (719) 577-4356
Email: lance@searsassociates.com

Paul Lundberg
LUNDBERG LAW, PLC
600 4TH Street, Suite 906
Sioux City, IA 51101
Tel: (712) 234-3030
Fax: (712) 234-3034
Email: paul@lundberglawfirm.com

Jessica Dillon
Ray R. Brown
Molly Brown
DILLON & FINDLEY, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 277-5400
Fax: (907) 277-9896
Email: Jessica@dillonfindley.com
Ray@dillonfindley.com
Molly@dillonfindley.com

Gwen Simons
Simons & Associates Law, P.A.
P.O. Box 1238
Scarborough, ME 04070-1238
Tel: (207) 205-2045
Fax: (207) 883-7225
Email: gwen@simonsassociateslaw.com

Cynthia C. Moser
HEIDMAN LAW FIRM
1128 Historic 4th Street
P. O. Box 3086
Sioux City, IA 51101
Tel: (712) 255-8838
Fax (712) 258-6714
Email: Cynthia.Moser@heidmanlaw.com

Attorneys for Intervenor

VERIFICATION OF W. THOMAS MCGOUGH, JR.

I, W. Thomas McGough, Jr. declare and verify:

1. I am employed as Executive Vice President and Chief Legal Officer by the University of Pittsburgh Medical Center.

2. I verify that the foregoing Verified Motion for and on behalf of certain UPMC facilities was duly prepared under my direction; that the facts stated therein have been assembled by authorized employees and counsel for UPMC and that the allegations therein are true and correct to the best of my knowledge, information and belief.

3. I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

Executed in Pittsburgh, PA on February 21, 2019.

Respectfully submitted,

W. Thomas McGough, Jr.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 21st day of February, 2019 electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.